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No. 92-798

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, PETITIONERS,

v.

COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit

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OPPOSITION TO MOTION TO FILE BRIEF *AMICUS CURIAE*

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The Coalition for Clean Air and Sierra Club (jointly, the "Coalition")[1] oppose the motion for leave to file a brief *amicus curiae* filed by the law firm of Latham & Watkins, counsel for Respondent Southern California Edison Company in these proceedings, on behalf of the Los Angeles Area Chamber of Commerce ("Chamber").

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[1]Respondents Coalition for Clean Air and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Sup. Ct. R. 29.1.

Southern California Edison Company ("Edison"), a major utility company in the Southern California area and a party to the proceedings below, which we are informed is a member of the Chamber, elected not to file a brief in support of the Environmental Protection Agency's ("EPA") petition for writ of certiorari within the twenty day period required under Supreme Court Rule 12.4. Instead, after the Coalition's brief had been dispatched to the printer,[2] the Coalition was informed that the Chamber, represented by the same law firm as Edison, intended to file a brief on behalf of its members, including Edison. The practical effect of this approach was to prevent the Coalition from addressing in the brief in opposition the points made by Southern California industrial interests, including Edison. For that reason, this opposition is being filed.

Moreover, the Chamber presents essentially the same arguments as does EPA regarding the potential impacts of air quality regulation on the Southern California economy. Not surprisingly, the Chamber's brief suffers from the same fundamental flaws as does EPA's. First, the Chamber assumes without providing any direct support that partial federal planning will be more expensive and less efficient than planning based solely on state and local authorities. Indeed, the South Coast Air Quality Management District has provided clear evidence to the contrary in its brief in opposition -- that the **least** costly set of regulations will need to include federal measures. Pure argument, rather than citation to evidence, by EPA, the Chamber, and by the Southern California Association of

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[2]The Coalition was informed the afternoon of Friday, December 4 that the Chamber intended to file its brief the next Monday. No previous notice had been provided and the Coalition had relied upon Edison's failure to file a supporting brief within the twenty day period in selecting the issues to present in its opposition.

Governments ("SCAG"),[3] does not support the proposition that the federal implementation plan ("FIP") will be inefficient.

Second, as with EPA and SCAG, the Chamber assumes that the FIP will need to be complete in and of itself, rather than filling gaps and building upon the state plan that has already been submitted to EPA. This argument ignores the added flexibility built into the definition of FIPs by the 1990 Amendments, as well as the nature of the FIP that EPA actually proposed in September, 1990. 42 U.S.C. § 7602(y) (Supp. II 1990); 55 Fed. Reg. 36,458 (1990):

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emissions limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

The Chamber's repeated reference to "two layers of environmental regulations" and "an across-the-board strategy . . . adopted *in addition* to existing state and local standards" is a straw man. Chamber Brief at 3, 6, 9 (emphasis in original). Under the new FIP definition, EPA clearly does not need to include controls already included in the state plan, and the FIP

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[3]The Southern California Association of Governments, party to the proceedings below, filed a second petition for writ of certiorari in this case, rather than filing a brief in support of EPA's petition within the twenty day period under Rule 12.4. In order to move this matter forward, the Coalition's opposition to SCAG's petition is being filed this same date.

can be partial and supportive, rather than complete in and of itself.

Similarly, the Chamber's argument that the federal plan will be required before state planning efforts can take place ignores the fact that a state plan has already been submitted and is presently pending before the EPA. 55 Fed. Reg. 36,458 (1990). EPA proposed to approve the control measures in this state plan in September, 1990, but has not yet finalized that action. *Id.* The Chamber's suggestion (Chamber Brief at 7), that EPA can or should ignore this pending state plan submission until 1994 when additional matters must be addressed, inappropriately seeks to continue the implementation plan gap in the South Coast that underlies this action. The 1994 deadline for additional state plan submissions under the 1990 Amendments is an outside limit and there is absolutely no support in the statute for the suggestion that presently pending state plan submissions should be ignored until that date.

The Chamber's concern that the FIP will be hastily developed (Chamber Brief at 8) ignores the role of the District Court in setting an appropriate schedule, and the mutual interest of all parties, including the Coalition, that EPA be given sufficient time to develop an efficient, well documented and appropriate plan based upon full public participation. The Chamber's suggestions to the contrary are pure speculation.

Also speculative and incorrect is the Chamber's suggestion that EPA's direct FIP regulations will be less susceptible to change than comparable state-initiated implementation plan provisions. Chamber Brief at 8. However, once approved by EPA as part of an implementation plan, state measures can only be changed or removed through a subsequent EPA rulemaking or order -- just the same as with federally-adopted measures. 42

U.S.C. §§ 7410(i), 7602(q) (Supp. II 1990). Adopted state implementation plan provisions are no more or less flexible than federal implementation plan requirements. In fact, EPA's proposed FIP primarily contained measures that, "would be rescinded or their requirements lessened if State and local efforts suffice . . . ," making clear that obsolete measures would not be retained. 55 Fed. Reg. at 36,500 (1990).

Finally, the nature of the Chamber's arguments illustrates that this is fundamentally a political matter that was resolved by Congress in the 1990 Amendments through the compromise language selected in Section 110(c), continuing EPA's FIP obligations where SIP disapproval occurs, but relaxing the requirements of the FIP through the new FIP definition. The only appropriate lobbying, however, was that lobbying directed to Congress, and the Chamber's lobbying efforts before this Court should be disregarded.

Respectfully submitted,

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